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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.02.2022

CORAM:

THE HONOURABLE MR.JUSTICE C.V. KARTHIKEYAN

C.M.A.No.2647 of 2018
and
C.M.P.No.19986 of 2018

S.Sukumaran

.. Appellant

vs.

S.Eswaran

.. Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 104 of the Civil Procedure Code praying to set aside the fair and decretal order dated 09.10.2018 in I.A.No.476 of 2017 in O.S.No.303 of 2016 on the file of the III Additional District Court, Salem.

For Appellant : Ms.M.N.Preeti Rajan
for Mr.K.Selvaraj

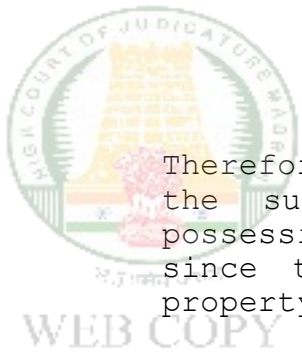
For Respondent :Ms.V.Janaranjani
for Mr.N.Damodaran

J U D G M E N T

The plaintiff in O.S.No.303 of 2016 pending on the file of III Additional District Court, Salem is the appellant herein.

2. The suit in O.S.No.303 of 2016 has been filed seeking partition and separate possession of 1/3rd undivided share in the suit property and also to pass final decree in accordance with the preliminary decree granted.

3. The property is situated at Salem and included land and building totally measuring an extent of 1710 sq.ft at Thathakapatty, Salem in T.S.Nos.2223 and 2226. In the plaint, it was claimed that Sulochana, the mother of the plaintiff, who was also the mother of the defendants, had purchased the suit property by way of a registered sale deed dated 22.04.1964. She had then put up a small house in the said property. She died intestate on 05.03.2009, leaving behind the plaintiff/son, first defendant/son and the second defendant/daughter as her legal heirs. She had also left behind her husband T.Sambalingam. The said father T.Sambalingam died intestate on 30.07.2015.



Therefore, claiming undivided 1/3rd share in the suit property, the suit had been instituted for partition and separate possession. It was claimed that a notice had been issued but since the defendants did not come forward to partition the property, necessity arose to institute the suit.

4. Written statement had been filed by the first defendant, wherein he claimed that the mother Sulochana had bequeathed the suit property to her husband T.Sambalingam by an unregistered Will dated 27.07.2007. Therefore, after her death the father got the property in entirety. It was further stated that he had also executed a Will on 06.04.2014 in favour of the first defendant/respondent herein. It was therefore stated that a suit for partition is not maintainable and has to be dismissed.

5. Thereafter, the plaintiff issued a notice, calling upon the counsel for the first defendant to produce the Will dated 27.07.2007 executed by the mother Sulochana and the Will dated 06.04.2014 executed by the father T.Sambalingam for inspection. Since there was no response, though the Court had directed production of the documents, the plaintiff had filed an application under Order XI Rule 18 of C.P.C., calling upon the respondent/first defendant to offer the said documents for inspection. The documents were the two Wills mentioned above. Again the learned trial Judge directed production of documents. The application was adjourned for nearly about 2 years and finally on 21.11.2017, the following order was passed:

“ 21.11.2017

To produce documents

Documents not produced.

Respondent called absent.

No representation. Petition Closed.”

6. This order has to be necessarily interfered with. A petition cannot be just closed without indicating what that actually means. Thereafter, the petitioner herein/plaintiff filed a further application in I.A.No.476 of 2017 under Order XI Rule 21 of C.P.C. seeking to strike out the defense of the first defendant, since the Wills had not been produced.

7. An order was passed in the said application on 09.10.2018 dismissing the said application necessitating filing of the present appeal.

8. The entire proceedings aforementioned of the trial Court requires scrutiny. The plaintiff has every right to call upon the defendants, if there is a mention about documents, in this case to Wills, for which, dates have also been given, to produce



the same. The appellant herein following due procedure issued notice to produce documents. The documents had not been produced. Therefore, an application was filed calling upon the respondent/first defendant to make available the documents for inspection. Though, more than sufficient opportunity had been granted, the documents were again not produced.

9. Section 114(g) of the Indian Evidence Act, 1872 is very clear on this aspect. If a party does not produce a particular document then an adverse inference can be drawn, that the document has not been produced only because the document is adverse to the party, who in possession of the document and who claims to lay his case on the document. In the present case, the first defendant in the written statement has clearly stated about two separate Wills, one Will executed by mother Sulochana and another executed by father T.Sambalingam. Those two Wills were called upon to be produced by the respondent herein.

10. Notice to produce the documents was issued and an application was also filed. Further application was filed to strike out the defense, since Wills were not produced. The learned III Additional District Judge, Salem has dismissed the said application stating that the documents had not been produced and therefore such order cannot be passed. This order certainly required to be interfered with.

11. However, before this Court, the learned counsel appearing for the respondent stated that the two Wills will be produced. Let me record that particular statement and direct the respondent/first defendant to produce the two Wills executed by the mother Sulochana dated 27.07.2007 and by father T.Sambalingam dated 06.04.2014 for inspection by the appellant herein. Necessary explanation should also be given by way of an affidavit as to why he did not produce it for inspection, when notice to produce documents was issued.

12. The above particular statement made by the learned counsel for the respondent is recorded. The order under appeal is not interfered with. Let the defense stand, but the respondent/first defendant should produce both the copies of the Wills and file them in O.S.No.303 of 2016 on the file of III Additional District Court, Salem by 18.03.2022. If the documents are not produced and filed in the Court by that date, then, the defense of the respondent/first defendant must be automatically struck off.



With the above directions, the Civil Miscellaneous Appeal is disposed of. No costs.

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Sd/-
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

rsi

To

The III Additional District Judge,
Salem.

Copy To

The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.K.Selvaraj, Advocate SR.No.12244

+1cc to Mr.N.Damodaran, Advocate SR.No.12676

C.M.A.No.2647 of 2018
and
C.M.P.No.19986 of 2018

GPL (CO)
GMY (21/03/2022)